

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

21 Before the court is the Motion to Stay Discovery (Doc. #18)<sup>1</sup> of Defendants Banner Health,  
22 dba Banner Churchill Community Hospital (“Banner Hospital”) and Warren P. Thai (“Dr. Thai”).  
23 Defendants seek to postpone discovery pending the disposition of the Defendants’ motions to dismiss.  
24 (Doc. ## 6, 9, 10). Defendant Donald Gandy, D.O. (“Dr. Gandy”) joined in the motion to stay.  
25 (Doc. # 19.) Plaintiffs Sherry Money, the Estate of Kenneth Money, and Kenny Money (“Plaintiffs”)  
26 have filed an opposition to the motion to stay (Doc. # 20) and Banner Hospital and Dr. Thai have  
27 replied (Doc. # 21).

<sup>1</sup> Refers to court's docket number.

## **I. BACKGROUND**

According to the allegations contained in Plaintiffs' complaint, at approximately 2:30 p.m. on November 4, 2010, Kenneth Money ("Mr. Money") presented at the emergency room at Banner Hospital in Fallon, Nevada, complaining of chest pain radiating to his jaw. (Compl. #1 at 3:6-10.)

Mr. Money was initially assessed by a Banner Hospital nurse and subsequently seen and treated by Dr. Gandy. (*Id.* at 3-4.) Following a review of Mr. Money's medical history and a physical examination, Dr. Gandy ordered a series of medications for him, including Clonidine and morphine. (*Id.*) Mr. Money was subsequently also examined by Dr. Thai, who diagnosed hypertension, back pain, and morbid obesity. (*Id.* at 4:19.)

An EKG was then performed. (Pls.’ Expert Affidavit (#1-1) at 3:9.) Although Mr. Money’s EKG reading “was essentially normal,” his condition apparently started deteriorating. (*Id.*) Drs. Thai and Gandy then ordered additional EKGs, several blood tests, a chest x-ray, a CT scan, and “repeated cardiac lab” reports. (*Id.* at 4-7.) A 11:45 p.m., after ruling out a diagnosis of aortic dissection, Drs. Thai and Gandy diagnosed Mr. Money with acute myocardial infarction. (*Id.* at 3:13.) He was treated for a heart attack and for cardiac ischemia (*Id.* at 6:17.) Soon thereafter, Mr. Money was transferred to Banner Hospital’s intensive care unit (ICU). (*Id.* at 7:1.)

At 12:33 a.m., an unidentified doctor signed a request to air transfer Mr. Money to St. Mary's Hospital in Reno. (Doc. #1 at 4:21-22.) Plaintiffs' complaint does not specify whether the unidentified doctor's request to transfer Mr. Money was denied or granted. (*Id.*) From the information in Plaintiffs' pleadings, the court's interpretation of the events is that Mr. Money was *not* transferred. At 12:39 a.m., Mr. Money went into cardiac arrest. (*Id.* at 4:23-24.) Despite the attempts of Dr. Thai and other Banner Hospital personnel to revive him, Mr. Money was pronounced dead at 1:12 a.m. (*Id.* at 5:42.)<sup>2</sup>

On November 3, 2011, Mrs. Money, the Estate of Mr. Money, and Kenny Money filed suit in United States District Court for the District of Nevada against Banner Hospital, Dr. Thai, and

<sup>2</sup> The Plaintiffs' complaint ,“General Allegations,” and the NRS Chapter 41A affidavit of Plaintiffs' expert, Dr. Mark Boren (Doc. ## 1 and 1-1) describe in greater detail the treatment Mr. Money received.

1 Dr. Gandy. (Doc. #1.) Federal question jurisdiction is predicated by Plaintiffs under 28 U.S.C. § 1331  
 2 solely on the component of the action asserted against Banner Hospital (Doc. #1 at 2:22.) More  
 3 specifically, Plaintiffs allege that the circumstances surrounding Mr. Money's death give rise to a  
 4 federal cause of action under the Emergency Medical Treatment and Active Labor Act, 42 U.S.C.  
 5 § 1395dd, ("EMTALA").

6 EMTALA, commonly known as the "Patient Anti-Dumping Act," was enacted in response to  
 7 congressional concern about the quality of medical services provided primarily to the indigent and the  
 8 uninsured who seek care from hospital emergency rooms. *Jackson v. East Bay Hospital*, 246 F.3d  
 9 1248, 1254 (9th Cir. 2001). Congress suspected that hospitals were "dumping" patients who were  
 10 unable to pay for care, either by refusing to provide basic emergency treatment (*i.e.*, "failure to  
 11 screen") or by transferring patients to other hospitals before the patients' conditions sufficiently  
 12 stabilized to allow transfer ("failure to stabilize"). *See H.R. Rep. No 241, 99th Cong., 1st Sess., Part*  
 13 *I*, at 27 (1985) (cited in *Jackson*, 246 F.3d at 1254)).

14 In an attempt to remedy this problem and provide legal recourse to such patients, EMTALA  
 15 created a new federal cause of action against hospitals for failing to appropriately screen hospital  
 16 patients. *Bryant v. Adventist Health System West*, 289 F.3d 1162, 1168 (9th Cir. 2002) (citation  
 17 omitted). EMTALA also prohibits hospitals from "dumping" the patient on other hospitals by  
 18 transferring the patient before the patients' conditions stabilize. *Jackson*, 246 F.3d at 1254-55.<sup>3</sup>  
 19 However, EMTALA is *not* a medical malpractice statute and provides no cause of action for what  
 20 would traditionally be considered medical malpractice. Causes of action under EMTALA are limited  
 21 to suits against hospitals. *Id.*

22 According to Plaintiffs, Banner Hospital violated both elements of EMTALA, first, by failing  
 23 to screen Mr. Money and, second, by failing to stabilize him. (Doc. # 1 at 5-10.) In addition, Plaintiffs  
 24 asserted state law claims (traditional medical malpractice and wrongful death) against Banner Hospital,  
 25 Dr. Thai, and Dr. Gandy pursuant to the federal court's pendent jurisdiction under 28 U.S.C. §1337(a).  
 26 Plaintiffs' complaint was accompanied by the medical expert affidavit as required by Chapter 41A,

---

27  
 28 <sup>3</sup> The two causes of action against a hospital are typically styled or captioned as a "failure to screen"  
     and/or a "failure to stabilize," as they are herein.

1 Nev. Rev. Stat. (Doc. #1-1).<sup>4</sup>

2 On January 14, 2012, and January 17, 2012, Banner Hospital and Dr. Thai filed two Rule  
 3 12(b)(6) motions to dismiss. (Doc. ## 9, 10.) Of importance here is the second motion (Doc. # 10),  
 4 which questions federal jurisdiction. The substance of Banner Hospital’s and Dr. Thai’s motion is that  
 5 Plaintiffs’ claims against Banner Hospital should be dismissed because of Plaintiffs’ failure to  
 6 articulate a viable EMTALA claim, without which this court would not have a jurisdictional basis to  
 7 hear this case. (Doc. # 10 at 7:7-9.)<sup>5</sup>

8 In that regard, Banner Hospital and Dr. Thai argue that no “patient dumping” occurred because  
 9 Mr. Money was both screened (*i.e.*, the “failure to screen” cause of action) and stabilized (*i.e.*, the  
 10 “failure to stabilize” claim for relief) by hospital personnel consistent with EMTALA requirements.  
 11 Defendants also argue that EMTALA would not give rise to either a screening or stabilization cause  
 12 of action because Mr. Money was *admitted* to Banner Hospital, (Doc. # 10 at 7-8.) Defendants further  
 13 argue that Plaintiffs’ complaint fails with respect to Plaintiffs’ EMTALA claims, because they merely  
 14 reflect a “formulaic recitation of the elements of a cause of action,” which *Ashcroft v. Iqbal*, 556 U.S.  
 15 662 (2009), prohibits. (Doc. # 9 at 5:24-25.)

16 On February 28, 2012, Banner Hospital and Dr. Thai filed a Motion to Stay Discovery  
 17 (Doc. # 18) pending disposition of Defendants’ Motions to Dismiss. (Doc. ## 9, 10.) Dr. Gandy  
 18 joined in Banner Hospital’s and Dr. Thai’s Motion to Stay. (Doc. # 19.) As will be discussed in  
 19 greater detail herein, whether a stay of discovery should or should not be granted herein is dependent  
 20 on whether this court determines it is probable the underlying Motion to Dismiss (Doc. # 10) will be  
 21 granted.

---

22

23       <sup>4</sup> Plaintiffs do not assert diversity as a basis for federal jurisdiction. (See Doc. # 1 at 2:22.). Jurisdiction  
 24 for the common law “malpractice claims” plaintiffs allege would fall under the court’s pendent jurisdiction.  
 25 Thus, whether federal jurisdiction is present in the instant matter to allow the action to proceed in this court will  
 depend on the viability of Plaintiffs’ EMTALA averments which are lodged solely against Banner Hospital.

26       <sup>5</sup> On November 29, 2011, Dr. Gandy filed a motion to dismiss on the grounds that the court lacks subject  
 27 matter jurisdiction against him because Plaintiffs did not plead a federal cause of action against him. (*Id.* at 5-6.) He also argues that the court should not exercise supplemental jurisdiction in his case because combining  
 28 Plaintiffs’ claims against him with those lodged against Banner Hospital would likely confuse the jury as  
 different standards of care apply. (*Id.* at 8.) For the reasons stated herein, the merits of Dr. Gandy’s Motion (Doc.  
 #6) are not addressed by this order.

1       Banner Hospital, Dr. Thai, and Dr. Gandy submit that discovery should be stayed herein for  
 2 four reasons. First, Defendants argue that staying discovery is justified because the underlying motions  
 3 to dismiss are potentially dispositive of the entire case. (Doc. # 18 at 2-3.)

4       Second, Defendants assert staying discovery is appropriate because the pending Motion to  
 5 Dismiss (Doc. # 10) can be decided without further discovery. (*Id.* at 3:7.) In that regard, Plaintiffs  
 6 make only a passing reference for the need of additional discovery in their Opposition to the Motion  
 7 for Stay (Doc. #20). At page 4, Plaintiffs state that “[w]ithout discovery to determine the policies and  
 8 procedures of the Defendants, such a dispositive motion cannot be granted.” (*Id.* at 4). Plaintiffs’  
 9 Opposition to the Defendants’ EMTALA Motion to Dismiss (Doc. #15) only mentions in the  
 10 conclusion that “this case must be permitted to proceed to discovery” (*id.* at 12), without stating what  
 11 discovery Plaintiffs need to rebut Defendants’ assertions that Plaintiffs have not stated a viable  
 12 EMTALA claim.

13       However, the complaint alleged that “the examination provided to Kenneth was not comparable  
 14 to the one offered to other patients presenting similar symptoms, namely for MI.” (Doc. # 1 at 5, ¶47).  
 15 This was not an allegation made on “information and belief.” From this averment, the reader would  
 16 assume that the pleader already knew what Banner Hospital’s screening and stabilization policies and  
 17 procedures were. Similarly, Plaintiffs’ Opposition to the Motion to Dismiss (Doc. #15) states that “[i]t  
 18 is Plaintiffs’ assertion that Defendants did not follow their “usual” screening procedures.” (*Id.* at 4).  
 19 It is seemingly contradictory, on the one hand, for Plaintiffs to allege Defendants’ non-compliance with  
 20 Banner Hospital’s “usual” procedures “offered to other patients presenting similar symptoms”  
 21 (Compl., Doc. #1 at ¶48) or that Defendants did not follow “their ‘usual’ screening procedures” while,  
 22 on the other hand, to argue in their Opposition to the Motion to Stay that Plaintiffs need “discovery  
 23 to determine the policies and procedures of Defendants.” (Doc. # 20 at 4). The court also notes that  
 24 Plaintiffs did not request the court to defer consideration of the Motions to Dismiss to enable Plaintiffs  
 25 to undertake certain discovery.

26       Third, Defendants contend that a stay is warranted because forestalling the case pending  
 27 resolution of the Motion to Dismiss will not prejudice Plaintiffs. (*Id.* at 3:16.)

28       Fourth, and last, Defendants argue permitting discovery to proceed while the court considers

1 the Motion to Dismiss would subject Defendants to significant expenses, including the retention of  
 2 medical experts. (*Id.* at 3:21)

3 Conversely, Plaintiffs argue that staying discovery is inappropriate. Plaintiffs contend that they  
 4 have pled the *prima facie* requirements for EMTALA liability against Banner Hospital and that the  
 5 mere filing of a motion to dismiss should not stay discovery. (Doc. # 20 at 4.) As noted above,  
 6 Plaintiffs also make an oblique reference to the need to conduct discovery. Plaintiffs' further argue  
 7 Defendants' alleged financial hardship is insufficient to warrant a stay. (Doc. # 20 at 5.)

## 8                   **II. LEGAL STANDARD**

9                   In evaluating the propriety of an order staying discovery while a dispositive motion is pending,  
 10 the court initially considers the goal of Federal Rule of Civil Procedure 1. The guiding premise of the  
 11 Rules in general, and Rule 1 in particular, is that the Rules shall "be construed and administered to  
 12 secure the just, speedy, and inexpensive determination of every action." It needs no citation of  
 13 authority to recognize that discovery is expensive. The Supreme Court has mandated that trial courts  
 14 should resolve civil matters fairly but without undue cost. *Brown Shoe Co. v. United States*, 370 U.S.  
 15 294, 306 (1962). One of Defendants' grounds for requesting a stay herein is that expert witnesses will  
 16 need to be retained at considerable expense. If the underlying motions to dismiss are eventually  
 17 granted, Defendants will bear this expense if discovery is not stayed.

18                   Even if the parties may incur the expense of discovery while awaiting resolution of a  
 19 dispositive motion, the Federal Rules of Civil Procedure do not provide for automatic or blanket stays  
 20 of discovery when a potentially dispositive motion is pending. *Skellerup Indus. Ltd. v. City of Los*  
*Angeles*, 163 F.R.D. 598, 600-01 (C.D. Cal. 1995). However, pursuant to Federal Rule of Civil  
 21 Procedure 26(c)(1), "[t]he court may, for good cause, issue an order to protect a party or person from  
 22 annoyance, embarrassment, oppression, or undue burden or expense." Whether to grant a stay is  
 23 within the discretion of the court. *Munoz-Santana v. U.S. I.N.S.*, 742 F.2d 561, 562 (9th Cir. 1984).  
 24 The party seeking the protective order, however, has the burden "to 'show good cause' by  
 25 demonstrating harm or prejudice that will result from the discovery." Fed. R. Civ. P. 26(c)(1).

26                   Satisfying the "good cause" obligation is a challenging task. A party seeking "a stay of  
 27 discovery carries the heavy burden of making a 'strong showing' why discovery should be denied."

1        *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990) (citing *Blankenship v. Hearst Corp.*  
 2        519 F.2d 418, 429 (9th Cir. 1975)). The Ninth Circuit has held that under certain circumstances, a  
 3        district court abuses its discretion if it prevents a party from conducting discovery relevant to a  
 4        potentially dispositive motion. *See Alaska Cargo Transport, Inc. v. Alaska R.R. Corp.*, 5 F.3d 378,  
 5        383 (9th Cir. 1993) (stating the district court would have abused its discretion in staying discovery if  
 6        the discovery was relevant to whether or not the court had subject matter jurisdiction).

7               Two published decisions in this district have held that a stay of discovery is not warranted  
 8        simply because a dispositive motion is pending. *Twin City Fire Ins. v. Employers of Wausau*, 124  
 9        F.R.D. 652, 653 (D. Nev. 1989); *Turner Broadcasting Systems, Inc. v. Tracinda Corp.*, 175 F.R.D.  
 10       554, 556 (D. Nev. 1997). Both opinions concluded that to establish good cause for a stay, the moving  
 11       party must show more than that an apparently meritorious Rule 12(b)(6) motion to dismiss is pending  
 12       in the litigation. *Id.* Instead, citing *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981) cert. denied,  
 13       455 U.S. 942 (1982), *Twin City* and *Turner* both ruled a district court “may . . . stay discovery when  
 14       it is *convinced* that the Plaintiff will be unable to state a claim for relief.” *Id.* (emphasis in the  
 15       original). *Twin City*, 124 F.R.D. at 653; *Turner*, 175 F.R.D. at 555.

16               Typical situations in which staying discovery pending a ruling on a dispositive motion are  
 17        appropriate would be where the dispositive motion raises issues of jurisdiction, venue, or immunity.  
 18       *Id.* As discussed below, the substance of Defendants’ motion herein is an attack on federal  
 19       jurisdiction, *i.e.*, whether Plaintiffs’ EMTALA claims against Banner Hospital will survive a motion  
 20       to dismiss. If the court is convinced the underlying motion, if granted, would be dispositive of the  
 21       federal claims herein, then the court should enter a stay of discovery pending formal resolution of the  
 22       underlying motion. *Id.*

23               The Northern and Eastern District courts of California have applied an analogous but somewhat  
 24        different two-part test for evaluating whether and under what conditions discovery should be stayed.  
 25       In *Mlejneky v. Olympus Imaging America, Inc.*, No. 10-2630 2011 WL 489743 at \*6 (E.D. Cal.  
 26       Feb. 7, 2011), the court held that an underlying motion to dismiss must be potentially dispositive of  
 27       the entire case, or at least dispositive on the issue on which discovery stay is sought. *Id.* Second, the  
 28       court must determine whether the pending motion can be decided without additional discovery. *Id.*

1 In applying this two-part test, the court evaluating the motion to stay must take a so-called “preliminary  
 2 peek” at the merits of the underlying pending dispositive motion to assess whether a stay of discovery  
 3 is warranted. If the party moving to stay satisfies both prongs of the *Mlejnecky* test, discovery may be  
 4 stayed.

5 Similarly, a decision from the Central District of California has held that discovery should be  
 6 stayed while a dispositive motion is pending “only when there are no factual issues in need of further  
 7 immediate exploration, and the issues before the Court are purely questions of law that are potentially  
 8 dispositive.” *Skellerup Indus. Ltd.* 163 F.R.D. at 601 (citing *Hachette Distribution, Inc. v. Hudson*  
 9 *County News Co.*, 136 F.R.D. 356, 358 (E.D.N.Y. 1991)).

10 The issue of whether a motion to stay should be granted pending the resolution of a motion to  
 11 dismiss was recently decided by the Hon. Peggy A. Leen, Magistrate Judge, in the case of *TradeBay,*  
 12 *LLC v. Ebay, Inc.*, No. 11-702 2011 WL 6182039 (D. Nev. Dec. 13, 2011). Judge Leen was  
 13 confronted with a similar request by the defendant’s motion to stay discovery pending the resolution  
 14 of a motion to dismiss. *Id.* Therein, Judge Leen adopted the standard enunciated in *Twin City, Turner,*  
 15 and *Olympus Imaging*. Judge Leen concluded that a stay of discovery should be ordered only if, after  
 16 taking a “preliminary peek” at the merits of the pending dispositive motion, the court is “convinced”  
 17 that the Plaintiff will be unable to state a claim for relief.

### 18 III. DISCUSSION

19 This court embraces the well-reasoned approach and analysis of this discovery issue undertaken  
 20 by Judge Leen in *TradeBay* and will apply these standards herein with respect to Defendants’ motion.<sup>6</sup>  
 21 Following Judge Leen’s decision in *TradeBay*, the court herein has undertaken and completed its  
 22 “preliminary peek” of Banner Hospital’s and Dr. Thai’s motion to dismiss (Doc. # 10). In that regard,  
 23 the court notes two major shortcomings in Plaintiffs’ action against Banner Hospital. First, although  
 24

---

25         <sup>6</sup> Echoing Judge Leen, this court notes that taking a “preliminary peek” at the pending dispositive motion  
 26 recommended by *Olympus Imaging* places a magistrate judge in an awkward position. The court’s “preliminary  
 27 peek” requires the court to be “convinced” the underlying motion to dismiss is meritorious. However, the district  
 28 judge who will eventually consider the motion to dismiss (which is a dispositive motion) may have a very  
 different view of the merits of the underlying motion. See *TradeBay*, 2011 WL 6182039 at \*5. Thus, this court’s  
 “preliminary peek” is not intended to prejudice the outcome but merely to evaluate the propriety of an order  
 staying or limiting discovery by undertaking a general analysis of the merits of the underlying motion. *Id.*

1 a complaint need not contain “detailed factual allegations,” Rule 8 requires “more than an unadorned,  
 2 the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (citing *Bell*  
 3 *Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007)). As enunciated in *Iqbal*, “a complaint must  
 4 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its  
 5 face.’” *Id.* Plausibility requires more than “a sheer possibility that defendant has acted unlawfully.”  
 6 *id.* “Where a complaint pleads fact that are ‘merely consistent with’ a defendant’s liability, it ‘stops  
 7 short of the line between possibility and plausibility of entitlement to relief.’” *Id.* As recently noted  
 8 by the Hon. Edward C. Reed, Jr., Senior District Judge, Rule 8 “does not unlock the doors of discovery  
 9 for a plaintiff armed with nothing more than conclusions.” *Marin v. Wells Fargo Bank, N.A.*,  
 10 No. 11-309 2012 WL 424564 at \*2 (D. Nev. Feb. 9, 2012) (quoting *Iqbal*, 556 U.S. at 662)).

11 The court finds Plaintiffs’ complaint herein is conclusory with respect to Plaintiffs’ EMTALA  
 12 averments. The complaint parrots the required elements for an EMTALA cause of action without  
 13 averring specific facts how Defendants, Banner Hospital in particular, either failed to screen the patient  
 14 or failed to stabilize him before transfer.<sup>7</sup> Plaintiffs’ Complaint and Opposition to Defendants’  
 15 Motions to Dismiss (Doc. # 1, ¶48; Doc. # 15 at 4) both allege Banner’s noncompliance with its own  
 16 procedures but does not specify what the “usual procedures” are and how these “usual procedures”  
 17 differed with the treatment provided Mr. Money.

18 Second, Defendants’ Motion to Dismiss (Doc. # 10) questions whether the Plaintiffs have  
 19 stated a viable EMTALA claim, which is the predicate for federal court jurisdiction. Banner Hospital  
 20 and Dr. Thai argue that Plaintiffs’ EMTALA claims fail as a matter of law because the facts alleged  
 21 in Plaintiffs’ Complaint do not give rise to a viable EMTALA (*i.e.*, failure to screen and/or failure to  
 22 stabilize) cause of action. (Doc. # 10 at 7.) Defendants contend that the basis for federal jurisdiction  
 23 fails because, even after admitting the alleged facts as true, there is no viable or actionable federal  
 24 EMTALA claim asserted herein.

25 The Court’s review of the underlying motion via the so-called “preliminary peek” will focus  
 26 on the Plaintiffs’ claims asserted with respect to federal jurisdiction, *i.e.*, the two EMTALA causes of  
 27

---

28 <sup>7</sup> As discussed *infra*, the patient was not transferred, which will be seen as an important issue.

1 action. If thereafter the court is “convinced” the Plaintiffs’ EMTALA claims will not survive  
 2 Defendants’ Motion to Dismiss (even assuming there were no *Iqbal* deficiencies in Plaintiffs’  
 3 pleading), then a stay of discovery should be entered herein.<sup>8</sup>

4 ***A. The Federal Jurisdiction Component of Plaintiffs’ Complaint***

5 As is well-established, federal courts are courts of limited jurisdiction and are “presumed to  
 6 lack jurisdiction in a particular case unless the contrary affirmatively appears.” *Stockwest, Inc. v.*  
*7 Confederate Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989) (citation omitted);  
*8 Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). “Without jurisdiction [a] court  
 9 cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist,  
 10 the only function remaining in every federal case [is] that of announcing the fact and dismissing the  
 11 cause.” *Ex parte McCardle*, 74 U.S. 506, 514 (1869).

12 Plaintiffs’ Complaint premises this court’s jurisdiction pursuant to 28 U.S.C. § 1331. As stated  
 13 above, the federal jurisdiction Plaintiffs seek to invoke is that Banner Hospital and its agents allegedly  
 14 violated EMTALA, first, by failing to screen Mr. Money and, second, by failing to stabilize him.  
 15 (Doc. # 1 at 2:21-22, 5-6.) Plaintiffs’ Complaint does not allege any other grounds that would warrant  
 16 this court’s exercise of jurisdiction over Plaintiffs’ case. (*See generally* Doc. # 1.)

17 Central to the court’s analysis is that the only defendant named with regard to Plaintiffs’  
 18 EMTALA causes of action is Banner Hospital. (*Id.* at 5-6.) The EMTALA statute, 42 U.S.C.  
 19 § 1395dd(d)(2)(A), only authorizes suits against hospitals, not physicians. Numerous decisions  
 20 confirm that EMTALA provides no right of action against physicians. *See, e.g., Delaney v. Cade*, 986  
 21 F.2d 387, 393 (10th Cir. 1993); *Baber v. Hospital Corp. of Am.*, 977 F.2d 872, 877 (4th Cir. 1992);  
 22 *Gatewood v. Washington Healthcare Corp.*, 933 F.2d 1037, 1040 n. 1 (D.C. Cir. 1991); *Helton v.*  
 23 *Phelps County Regional Med. Ctr.*, 817 F. Supp. 789 (E.D. Mo. 1993); *Holcomb v. Monahan*, 807 F.  
 24 Supp. 1526, 1531 (M.D. Ala. 1992); *Richardson v. Southwest Mississippi Regional Med. Ctr.*, 794 F.  
 25 Supp. 198 (S.D. Miss. 1992).

---

26  
 27       <sup>8</sup> Because Banner Hospital’s and Dr. Thai’s Motion to Dismiss (Doc. #10) raises a jurisdictional  
 28 question, it is not necessary for the court to evaluate the merits of Plaintiffs’ state law malpractice claims against  
 Banner Hospital, Dr. Thai and Dr. Gandy. *See infra* at p. 16.

1       Thus, if there is no basis under the facts as alleged herein for an EMTALA claim against  
 2 Banner Hospital, it necessarily follows that there is no federal jurisdiction for this court to hear this  
 3 lawsuit and Plaintiffs' state law causes of action would have to be dismissed. *Jones v. Community*  
 4 *Redevelopment Agency*, 733 F.2d 646, 651 (9th Cir.1984) (stating that dismissal of federal claims  
 5 before trial dictates that the pendent state claims should be dismissed as well); *see also Deron v.*  
 6 *Wilkins*, 879 F. Supp. 603, 606-077 (S.D. Miss. 1995) (remanding plaintiff's medical malpractice  
 7 claims to state court because there was no basis under the facts for plaintiff's EMTALA claim).

8       Consequently, the court's decision to grant or deny Defendants' motion to stay discovery is  
 9 dependent on whether Plaintiffs' Complaint contains sufficient factual allegations against Banner  
 10 Hospital to warrant the court's exercise of federal jurisdiction under EMTALA and 28 U.S.C. § 1331.  
 11 As discussed above, the court must be "convinced" that Defendants' Motion to Dismiss (Doc. # 10)  
 12 will be granted in order to be able to enter a stay herein.

13 **B. Plaintiffs' EMTALA Claims Are Insufficient to Invoke the Court's Subject Matter  
 14 Jurisdiction**

15       After undertaking a review of the underlying motion (which required a more thorough analysis  
 16 of the merits of Plaintiffs' action and Defendants' Motions to Dismiss than a mere "preliminary peek"  
 17 would permit), the court concludes that *Iqbal* considerations aside, Plaintiffs' Complaint does not  
 18 contain the requisite factual allegations to support a viable EMTALA cause of action. As discussed  
 19 above, EMTALA is the "Patient Anti-Dumping Act," which prohibits hospitals from refusing to  
 20 appropriately treat indigent or low income patients by transferring the indigent patient to other  
 21 hospitals. *See Jackson*, 246 F.3d at 1255. Despite Plaintiffs' arguments to the contrary (*see, e.g.*,  
 22 Plaintiffs' Opposition to Motion to Dismiss (Doc. # 15 at 6)), EMTALA does not impose a national  
 23 standard of care on hospitals when screening patients. *Jackson*, 246 F.3d at 1255. Instead, the  
 24 "touchstone is whether, as §1395dd dictates, the procedure is designed to identify an 'emergency  
 25 medical condition' that is manifested by 'acute' and 'severe' symptoms." *Id.*

26       The gravamen of Plaintiffs' Complaint is that Banner Hospital violated EMTALA by  
 27 (1) failing to screen and/or (2) failing to stabilize Mr. Money. (Doc. # 1 at 5-6.) As discussed below,  
 28 the court concludes Plaintiffs' EMTALA causes of action fail as a matter of law because the facts

1 alleged by Plaintiffs' Complaint do not give rise to an actionable EMTALA claim, particularly under  
 2 *Iqbal's* plausibility requirements.

3       ***I. Plaintiffs' "Failure to Screen" EMTALA Claim (Doc. #1, First Cause of Action)***

4       After careful consideration of the parties' memoranda submitted to the court regarding the  
 5 Motion to Dismiss (Doc. # 10), the court is convinced Plaintiffs' Complaint does not give rise to a  
 6 viable EMTALA cause of action *for failure to screen*. As recognized by *Jackson*, faulty or incorrect  
 7 screening (similar to what Plaintiffs have averred herein) does not violate EMTALA. What gives rise  
 8 to a viable EMTALA claim is where the patient is not screened, or if screened, that the screening  
 9 differed markedly from that provided other patients. *Id.* 246 F.3d at 1254-55 (citing *Correa v. Hosp.*  
 10 *San Francisco*, 69 F.3d 1184, 1192-93 (1st Cir.1995); *Baber v. Hosp. Corp. of Am.*, 977 F.2d 872, 879  
 11 (4th Cir.1992)). Agreeing with the 8th Circuit's decision in *Summers v Baptist Med. Ctr. Arkadelphia*,  
 12 91 F.3d 1132, 1139, and *Holcomb v Monahan*, 30 F.3d 116, 1127 (11th Cir. 1994), the Ninth Circuit  
 13 stated that

14           [W]e hold that instances of 'dumping' or improper screening of patients  
 15 for a discriminatory reason, or the failure to screen at all, or screening  
 16 a patient differently from other patients perceived to have the same  
 17 condition, all are actionable under EMTALA. But instances of  
 18 negligence in the screening or diagnostic process, or of mere fault  
 19 screening, are not. \* \* \* As long a hospital applies the same screening  
 20 procedures to indigent patients which it applies to paying patients, the  
 21 hospital does not violate this section of the Act.

22       *Jackson, supra*, at 1255-56.

23       Here, based on Plaintiffs' pleadings, the inescapable conclusion is Mr. Money was, in fact,  
 24 screened consistent with EMTALA requirements. (*See Doc. # 1 at 3:11-12, 3:21-22, 5:21-22.*)  
 25 Dr. Gandy, Dr.Thai, and a nurse all examined Mr. Money. (*Id.*) There is nothing properly asserted  
 26 by Plaintiffs for the court to conclude he was not screened or that when screened, his screening differed  
 27 from "paying patients." Therefore, Plaintiffs' allegation that Banner Hospital violated EMTALA's  
 28 screening obligation because Mr. Money's screening was "cursory" is inapposite. Faulty, incorrect,

or “cursory” screening does not violate EMTALA. *Jackson*, 246 F.3d at 1254-55.

Furthermore, the court notes that the affidavit of the Plaintiffs' expert witness, Dr. Mark Boren, which accompanied Plaintiffs' Complaint, states that Mr. Money was *admitted* to Banner Hospital. (Doc. # 1-1, Ex. A at 5:17.) This fact of the patient's admission is also corroborated by Mr. Money's medical record (*see* Doc. # 10 at Ex. 1, pp. 7-8) and Plaintiffs' Opposition to the Motion to Dismiss (Doc. # 15 at 9:17-18). Although Mr. Money's admission into Banner Hospital was not pled in Plaintiffs' complaint, the "preliminary peek" this court has undertaken included consideration of the facts asserted in the affidavit of Plaintiffs' expert witness which was filed concomitantly with Plaintiffs' complaint. *TradeBay*, 2011 WL 6182039 at \*5 (citing *Twin City Fire Ins.*, 124 F.R.D. at 653; *Turner Broadcasting Systems, Inc.*, 175 F.R.D. at 556). As noted above, Plaintiffs' expert, Dr. Boren, stated Mr. Money was admitted to the hospital.

The fact that Mr. Money was admitted is critical because, by statute, Banner Hospital's obligations under EMTALA end when an individual like Mr. Money is screened and thereafter admitted for inpatient care. *See* 42 C.F.R. §489.24(d)(2)(1) (stating that a "hospital has satisfied its responsibilities" if the hospital has screened an individual and admits that individual as an inpatient in good faith in order to stabilize the emergency medical condition); *see also Bryant*, 289 F.3d at 1168-69. Bryant held that EMTALA liability ends "[a]fter an individual is admitted for inpatient care." As a result, the reference in Plaintiffs' expert's affidavit that Plaintiff was admitted to Banner Hospital would in and of itself prevent Plaintiffs from relying on EMTALA as a predicate for federal jurisdiction.<sup>9</sup>

Although this reference to Mr. Money’s admission to Banner Hospital was not included within the allegations of Plaintiffs’ Complaint, the affidavit accompanying the Complaint may have “pled Plaintiffs out of court.” *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988-89 (9th Cir. 2001) (“A plaintiff can plead himself out of court by alleging facts which show that he has no claim, even though he was not required to allege those facts ”) (citation omitted); *see also Curry v. Advocate*

<sup>9</sup> Plaintiffs' complaint does not allege the screening was not done in "good faith." Although Plaintiffs' argument with respect to a "failure to stabilize" was that the admission to Banner Hospital was a "sham" (*see infra* at §III B ii), the complaint contains no such averments.

1     *Bethany Hosp.*, 204 Fed. Appx. 553, 556 (7th Cir. 2006) (holding, in the EMTALA context, that  
 2 plaintiff “pled himself out of court by pleading” that he was screened by a hospital but, nonetheless,  
 3 died of cardiac arrest). A claim under EMTALA’s failure to screen rules is defeated if the patient is  
 4 admitted to the hospital, as Mr. Money was herein.

5         Finally, Plaintiffs’ allegations of a violation of EMTALA are implausible under the more  
 6 stringent pleading standard enunciated in *Iqbal*. As discussed above, Rule 8 requires “more than an  
 7 unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 662 (citation  
 8 omitted). The substance of Plaintiffs’ Complaint alleges that “Defendants failed to provide a screening  
 9 that complied with established protocols” and that “[t]he examination provided to [Mr. Money] was  
 10 not comparable to the one offered to other patients presenting similar symptoms.” (Doc. # 1  
 11 at 5:19-25.) Such conclusory allegations are insufficient to survive *Iqbal*’s plausibility requirements.  
 12 As noted above, Rule 8 “does not unlock the doors of discovery for a plaintiff armed with nothing  
 13 more than conclusions.” *Marin*, 2012 WL 424564 at \*2 (citations omitted).<sup>10</sup>

14         ii.     ***Plaintiffs’ “Failure to Stabilize” EMTALA Claim (Doc. #1, Second Cause of Action)***

15         With respect to Plaintiffs’ “failure to stabilize” argument, the court concludes Plaintiffs’  
 16 complaint does not state a claim on which relief can be granted for several reasons. First, EMTALA’s  
 17 stabilization requirements do not apply to the facts of Mr. Money’s case. Under EMTALA, a  
 18 hospital’s duty to “stabilize” a patient only arises in connection with the *transfer* of that patient to a  
 19 different hospital. 42 U.S.C. § 1395dd(c)(1)(“If an individual at a hospital has an emergency medical  
 20 condition which has not been stabilized [ . . . ] the hospital may not transfer the individual. . . ”).

21         That a hospital’s duty to stabilize only arises in the context of a *transfer* is confirmed by the  
 22 statute’s definition of the term “stabilize.” “The term ‘to stabilize’ means . . . to provide such medical  
 23 treatment of the condition as may be necessary to assure . . . that no material deterioration of the  
 24 condition is likely to result from or occur *during the transfer of the individual from a facility*.”  
 25 See 42 U.S.C. §1395dd(e)(3)(A) (emphasis added). As a result, the term “stabilize” in the context of

---

26                  <sup>10</sup> The court would note, however, that even if the patient had not been admitted to Banner Hospital, the  
 27 facts as alleged by Plaintiffs and as set forth in their expert’s affidavit demonstrate the patient was screened. The  
 28 court would also reach the same conclusion even if one were to conclude the averments of the Complaint  
 complied with *Iqbal*.

1 an EMTALA claim does not apply to individuals unless they are being transferred. *Bryant* 289 F.3d  
 2 at 1168.

3 Plaintiffs do not allege Mr. Money was transferred; from the Plaintiffs' Complaint and  
 4 Affidavit of Dr. Borden, it appears Mr. Money was *not* transferred. Thus, Plaintiffs' failure to stabilize  
 5 claims must necessarily fail. As the Ninth Circuit held in *Bryant*, 289 at 1168, EMTALA expressly  
 6 defines the term "stabilize" "only in connection with the *transfer* of an emergency room patient."  
 7 (Emphasis added.)

8 As with EMTALA's "failure to screen" claims, Plaintiffs' "failure to stabilize" claim also fails  
 9 herein because a hospital's liability under EMTALA terminates when a patient is *admitted* for inpatient  
 10 care. *Bryant*, 289 F.3d at 1168 ("We hold that EMTALA's stabilization requirement ends when an  
 11 individual is admitted for inpatient care"). As noted above, Mr. Money was admitted to Banner  
 12 Hospital. Consequently, Banner Hospital cannot be liable under EMTALA as a matter of law. Once  
 13 again, it appears that Plaintiffs have pled themselves out of court by proffering evidence that  
 14 demonstrates that Banner Hospital fulfilled its EMTALA obligations. *See Curry*, 204 Fed. Appx.  
 15 at 556 (holding that plaintiff "pled himself out of court by pleading" that he was screened by a hospital  
 16 but, nonetheless, died of cardiac arrest).

17 Additionally, Plaintiffs' failure to stabilize averments run afoul of the *Iqbal* pleading standards.  
 18 Plaintiffs allege that Banner Hospital violated EMTALA's stabilization requirement because Banner  
 19 Hospital "failed to provide treatment within its capabilities to stabilize [Mr. Money's] emergency  
 20 medical condition." (Doc. # 1 at 6:18-19.) This assertion is demonstrative of the conclusory  
 21 statements *Iqbal* forbids.<sup>11</sup> As noted above, the term "stabilize" only has meaning "in connection with  
 22 the *transfer* of an emergency room patient" and does not apply to individuals, like Mr. Money, who

23  
 24<sup>11</sup> Plaintiffs' "failure to stabilize" cause of action consists of the following averments:  
 25

**26 VIOLATION OF 42 U.S.C. § 1395dd FAILURE TO STABILIZE  
 27 (Against Defendant Banner)**

- 28 53. Plaintiffs reallege and incorporate the preceding paragraphs of this Complaint as if they  
 29 were fully set forth herein.  
 30 54. Kenneth had an emergency medical condition.  
 31 55. Banner had knowledge of Kenneth's emergency medical condition.  
 32 56. Banner failed to provide treatment within its capabilities to stabilize Kenneth's emergency  
 33 medical condition.

1 were not transferred. *See* 42 U.S.C. § 1395dd(e)(3)(A). As a result, EMTALA’s stabilization  
 2 requirement does not apply to the facts Plaintiffs allege because Mr. Money was not transferred.<sup>12</sup>

3       However, even if Mr. Money had been transferred and not admitted, the averments of the  
 4 complaint demonstrate that Banner Hospital and Dr. Thai made repeated attempts to “stabilize”  
 5 Mr. Money. Plaintiffs’ expert affidavit confirms this conclusion, noting that Drs. Gandy and Thai  
 6 performed EKGs, blood tests, a chest x-ray, a CT scan, and “repeated” cardiac lab reports.<sup>13</sup> Thus,  
 7 even if Mr. Money had been transferred, Plaintiffs’ allegations suggest Banner Hospital complied with  
 8 EMTALA, not that Banner Hospital violated EMTALA. There is also no basis to conclude Mr. Money  
 9 was the victim of any discriminatory medical treatment.

10       Plaintiffs attempt to evade this conclusion by arguing in their Opposition to the Motion to  
 11 Dismiss that Mr. Money’s admission into Banner Hospital was a “sham” which Banner Hospital  
 12 allegedly adopted to circumvent EMTALA liability. (Doc. # 15 at 9:5.) In that regard, the Ninth  
 13 Circuit has held that a hospital cannot escape EMTALA liability “by ostensibly ‘admitting’ a patient,  
 14 with no intention of treating the patient, and then discharging or transferring the patient without having  
 15 met the stabilization requirement.” *Bryant*, 289 F.3d at 1169. Known as a “sham” admission, such  
 16 admissions form a narrow exception to the general rule that EMTALA liability ends when the patient  
 17 is admitted to Banner Hospital. *Id.*

18       However, neither the averments of Plaintiffs’ Complaint nor Plaintiffs’ Opposition  
 19 Memorandum contain any facts supporting their assertion that Mr. Money’s admission was a “sham.”  
 20 (*See generally* Doc. ## 1, 15.) On the contrary, an impartial reading of the Complaint infers that  
 21 Defendants repeatedly attempted to treat and stabilize Mr. Money before he died. (*See* Doc. # 1 at  
 22 4-5.) These facts undermine Plaintiffs’ recently-asserted argument that Banner Hospital had no  
 23

---

24       <sup>12</sup> To be clear, however, as with the court’s conclusions regarding the application of *Iqbal* to Plaintiffs’  
 25 failure to screen claim, even if Plaintiffs’ failure to stabilize allegations satisfied *Iqbal*’s more stringent pleading  
 26 requirements, the court would still find that Plaintiff’s failure to stabilize claims fail under the EMTALA  
 27 analysis.

28       <sup>13</sup> The affidavit of Dr. Borden, although submitted to establish Plaintiffs’ claims of medical malpractice  
 29 under Chapter 41A of the Nevada Revised Statutes, demonstrates further compliance with EMTALA. (*See* Doc.  
 30 # 1-1.) Despite the fact that the affidavit is critical of the procedures and care Dr. Gandy and Dr. Thai provided,  
 it nevertheless demonstrates Banner Hospital’s compliance with EMTALA’s stabilization requirements.

1 intention of treating Mr. Money. (Doc. # 15 at 9.)

2 Plaintiffs also attempt to surmount this impasse by arguing that, given Mr. Money's condition,  
 3 Banner Hospital "could have never provided the necessary care . . . and, thus, their admission was a  
 4 sham." (*Id.* at 9:22-23.) This argument fails for several reasons. Dr. Borden's affidavit is devoid of  
 5 the conclusion that the emergency care Banner Hospital provided was a pretense or a "sham." Further,  
 6 it is undisputed that Mr. Money was never transferred or discharged. (See Doc. # 1 at 5 stating that  
 7 Mr. Money died in Banner Hospital.) Consequently, the "sham" admission exception is inapplicable  
 8 on the facts of Mr. Money's case.

#### **IV. CONCLUSION**

9 In sum, the court concludes that Plaintiffs' Complaint does not contain the requisite factual  
 10 allegations to sustain a finding that this court has jurisdiction over Plaintiffs' federal (EMTALA)  
 11 claims.

12 First, with regard to Plaintiffs' "failure to screen" claim, the law clearly states that even faulty  
 13 and incorrect screenings do not violate EMTALA. *Jackson*, 246 F.3d at 1255. Here, Plaintiffs  
 14 basically concede that Mr. Money was screened, albeit in an allegedly "cursory" fashion. (See Doc. # 1  
 15 at 3:11-12, 3:21-22, 5:21-22.) More importantly, the fact that Mr. Money was admitted to Banner  
 16 Hospital strikes a fatal blow to Plaintiffs' EMTALA screening claims.

17 Second, the law is equally clear that a violation of EMTALA's stabilization requirements can  
 18 only occur within the context of a transfer. See 42 U.S.C. § 1395dd(e)(3)(A). Here, Plaintiffs'  
 19 complaint does not allege that Mr. Money was transferred. (See Doc. # 1 at 4:25-26.) But, irrespective  
 20 of whether the decedent was transferred, the inescapable conclusion drawn from the allegations of the  
 21 complaint coupled with the opinions of Dr. Boren's affidavit, demonstrates that Banner Hospital  
 22 undertook attempts to stabilize the patient, efforts which fall within EMTALA's parameters.

23 As a result, this court's "preliminary peek" has "convinced" the court that Plaintiffs' EMTALA  
 24 claims will fail. Accordingly, the court will not have jurisdiction over the claims Plaintiffs assert  
 25 against Banner Hospital and therefore, the court must refrain from proceeding with Plaintiffs' state law  
 26 claims against Drs. Thai and Gandy.

27 As to the issue of a stay, the court notes that staying discovery in this case is appropriate

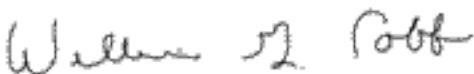
1 because, as recognized by Judge Leen in *TradeBay*, “[c]ommon situations in which a court may  
 2 determine that staying discovery pending a ruling on a dispositive motion occur when dispositive  
 3 motions raise issues of *jurisdiction*, venue, or immunity.” *TradeBay*, No. 11-702 2011 WL 6182039  
 4 at \*3 (D. Nev. Dec. 13, 2011) (citing *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981) (*per curiam*)  
 5 (emphasis added). The very jurisdictional situation described by Judge Leen exists here. Staying  
 6 discovery is proper because the court can decide the underlying motion to dismiss without further  
 7 discovery. See *Mlejnecky*, No. 10-2630 2011 WL 489743 at \*6 (stating that staying discovery is  
 8 appropriate if the court can decide the pending motion without further discovery). Other than a cursory  
 9 reference to discovery, Plaintiffs have not argued further discovery is needed to establish that subject  
 10 matter jurisdiction exists in this case. (See Pl.’s Opp. (#20) at 4-5.)

11 Because the court’s “preliminary peek” at Defendants’ Motion to Dismiss (Doc. #10) has  
 12 “convinced” the court that Plaintiffs’ EMTALA claims do not pass jurisdictional muster, the predicate  
 13 for pursuing Plaintiffs’ claims in federal court fail herein. Anticipating that Defendants’ motions to  
 14 dismiss will eventually granted, the court concludes that discovery should be stayed herein pending  
 15 final resolution of the motions to dismiss.

16 **IT IS THEREFORE ORDERED** that Defendants’ Motion to Stay Discovery (Doc. # 18)  
 17 pending disposition of Defendants’ motions to dismiss is **GRANTED**.

18 **IT IS SO ORDERED.**

19 DATED: April 9, 2012

20  
 21   
 22 WILLIAM G. COBB  
 23 UNITED STATES MAGISTRATE JUDGE  
 24  
 25  
 26  
 27  
 28